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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 564

ISAAC M. ELLER AND JACK V. ELLER,
Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

R. KYLE HAYES,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
The opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Summary statement	3
Reasons for issuance of writ	4
Brief in support of petition for writ	6
Conflict in the Circuits	8
Exhibit "A"—Indictment	13

Table of Cases Cited

United States v. *Carroll*, 345 U.S. 457, 73 S.Ct. 757	5, 6
United States v. *Mustari*, 109 Fed. (2d) 438	5, 8

Statutes Cited

Rules of the Supreme Court of the United States, Rule 38:	
Section 1	2
Section 5(b)	2
Treasury Regulations 17, 1945 Edition (26 C.F.R., Part 173; 10 F.R. 8734)	3
Treasury Regulations 17, approved April 4, 1951 (26 C.F.R., Part 173; 13 F.R. 5929)	2, 3, 8
United States Code:	
Title 18, Section 3731	2, 3
Title 26, Section 2811	2, 3, 6, 8
Title 28, Section 1254(1)	2

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ISAAC M. ELLER AND JACK V. ELLER,
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vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Isaac M. Eller and Jack V. Eller, respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered December 17, 1953, reversing the judgment of the United States District Court for the Middle District of North Carolina.

The Opinion Below

The Court of Appeals reversed the judgment of the District Court which upheld the petitioners' motion to dismiss

a 20 count indictment charging the violation of 26 USC 2811. (However, in the body of the indictment the same charged violation of the Internal Revenue Code and Regulations thereunder.) The opinion is in the record.

Jurisdiction

The jurisdiction of this court is invoked under the following:

Title 28 USCA 1254 (1).
Supreme Court Rule 38, Sections 1 and 5 (b).

Further jurisdiction is claimed by Title 18 USCA 3731. Since the United States appealed to the Circuit Court rather than to the Supreme Court of the United States the petitioners should be granted the right of a review by the Supreme Court.

Questions Presented

1. Do the petitioners have the right to have the Supreme Court of the United States review the adverse decision of the Circuit Court where the United States has elected to take the case to the Circuit Court, in the first instance, rather than the Supreme Court?
2. Is an indictment under Title 26 USCA 2811 sufficient within itself to bring the petitioners to trial without Regulations 17 to support it?
3. Did Regulations 17 of 1951 supersede Regulations 17 of 1945?
4. Does Regulations 17 of 1951 carry forward a demand letter issued in 1947 under Regulations 17 of 1945?
5. Did Congress by giving to the Secretary of the Treasury the authority to issue regulations intend to give the court authority to punish defendants for the violation thereof in excess of $500.00 fine and imprisonment for one year?

Statutes Involved

Title 26 USCA 2811.

Treasury Regulations 17 approved April 4, 1951 (26 CFR, Part 173; 13 F. R. 5929).

Treasury Regulations 17, 1945 Edition (26 CFR, Part 173; 10 F. R. 8734).

Title 18 USCA 3731.

Summary Statement

Petitioners seek review of the judgment of the United States Court of Appeals construing Title 26 USCA 2811 and Treasury Regulations 17, approved April 4, 1951, and Treasury Regulations 17 of 1945. The Circuit Court of Appeals reversed the District Court, which court had signed an order dismissing a 20 count indictment against the defendants. The District Court held that Regulations 17 of April, 1951, superseded and took the place of the prior Regulations 17 of the Treasury Department of 1945, and that a demand letter issued under the old regulations in 1947 was of no effect and did not constitute a demand on the defendants to report sales of sugar after the 1951 Regulations went into effect. The lower court construed Section 4 of the 1951 Regulations as a savings clause, which would enable the United States to prosecute for offenses committed under the old regulation after its repeal. The Circuit Court held that the demand letter issued under the superseded regulation was still in force and that the savings clause hereinafter set out related to acts done by the Commissioner and reversed the District Court and remanded the case ordering the defendants to answer to the indictment. Section 4 of the Regulations 17 of 1951 reads as follows:

> "4. These regulations shall not affect or limit any act done or any liability incurred under any regulations

superseded hereby, or any suit, action, or proceeding had or commenced in any civil, administrative, or criminal cause and proceeding prior to the effective date of these regulations, nor shall these regulations release, acquit, affect, or limit any offense committed in violation of previously existing regulations, or any penalty, liability or forfeiture incurred prior to such date."

The petitioners in apt time filed with the Court of Appeals a petition for re-hearing. The same was denied on January 4, 1954, and from the opinion and the denial of the petition for re-hearing these petitioners seek this writ to review the action of the Circuit Court of Appeals.

Reasons for Issuance of Writ

1. That the cause involved presents a grave question of vital importance to the public because of the multitudinous regulations issued by the Secretary of the Treasury and other Departments of the United States Government, whereby practically every citizen is affected thereby, and it ought to be determined whether Congress intended that the violation of a regulation could be broken down into a large number of counts at the election of the United States, or of the District Attorney, thus subjecting the citizen, if convicted therefor, to punishment which would result in imprisonment for the term of his active life (in this case 20 years) or whether Congress intended that the violation of a Regulation should be a maximum punishment of one year imprisonment and a fine of $500.00.

2. A second cause of grave importance to the public and that ought to be determined in this case is whether the United States can appeal to the Circuit Court of Appeals from the adverse ruling of the District Court and obtain a favorable ruling from the Circuit Court of Appeals, thereby

depriving the defendant of the right to have his case reviewed by this Court on his petition.

3. As a third ground the case at bar conflicts with the holdings of this Court in the case of *United States* v. *Carroll,* 345 U. S. 457, and conflicts with the holdings of the 7th Circuit in the case of *United States* v. *Mustari,* 109 Fed. 2nd 438, in principle.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents to the Court the question as to whether the United States can present a bill of indictment containing as many counts as it elects to present for the violation of a regulation, the punishment therefor under the statute being a maximum of one year in prison and a fine of $500.00, and by its action in so doing multiply the punishment for the violation of a regulation by the number of counts in the indictment. If convicted in this case the possible punishment could be 20 years imprisonment and a fine of $10,000.00 for each defendant. The petitioners respectfully contend that Congress never intended such drastic punishment for violation of Title 26 USCA 2811, and the regulations issued thereunder, or for the violation of any other regulations. Citing *United States* v. *Carroll*, 345 U. S. 457, 73 Sup. Ct. Rep. 757, Justice Douglas delivering the opinion says:

> "We hesitate to conclude that a failure to file an unverified schedule is given the same dignity as the failure to file the verified return. We are dealing with criminal sanctions in the complicated, technical field of the revenue law. The code and the regulations must be construed in light of the purpose to locate and check upon recipients of income and the amounts they receive. See S. Rep. No. 103, 65th Cong., 1st Sess. 20. But at the same time every citizen is entitled to fair warning of the traps which the criminal law lays. Where the "return" prescribed is a verified Form 1096 together with all the unverified Forms 1099 it does not seem fair warning to charge a person for more than the failure to make that return.* *To multiply the crimes by the number of Forms 1099 required to be filed is to revise the regulatory scheme.* So far as these information returns are concerned, the purpose of § 145(a) seems

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* Italics ours.

to us to be fulfilled when the sanction is applied only to a failure to file Form 1096."

In the case at bar the District Judge had for construction on a 20 count indictment against the petitioners Treasury Regulations 17, approved April 4, 1951. The pertinent parts thereof being as follows:

"Preamble. 1. These regulations, 'Regulations 17. Disposition of Substances Used in the Manufacture of Distilled Spirits' (26 CFR, Part 173) are a republication of Regulations 17, 1945 Edition (26 CFR, Part 173; 10 F. R. 8734) and all amendments and modifications thereof through December 31, 1950.

"2. These regulations consist only of previously approved material but the text has been rearranged and renumbered to conform to the Federal Register Regulations (13 F. R. 5929).

"3. * *These regulations shall, on and after April 1, 1951, supersede Regulations 17 (26 CFR, Part 173; 10 F. R. 8734).*

"4. These regulations shall not affect or limit any act done or any liability incurred under any regulations superseded hereby, or any suit, action, or proceeding had or commenced in any civil, administrative, or criminal cause and proceeding prior to the effective date of these regulations, nor shall these regulations release, acquit, affect, or limit any offense committed in violation of previously existing regulations, or any penalty, liability or forfeiture incurred prior to such date.

"5. It is found that compliance with the notice and public rule-making procedure and effective date limitations of the Administrative Procedure Act (5 U. S. C. 1001 et seq.) is unnecessary in connection with the issuance of the regulations in this part for the reason that the changes made are of a technical and clarifying nature and do not adversely affect the legitimate industry."

* Italics ours.

The District Court also had for construction Title 26 USCA 2811. The District Court dismissed the indictment against the defendants, construing section 3 of the Regulations as being the regulation in force on and after April 1, 1951.

In September, 1947 these defendants were served with a demand letter under the 1945 Regulations 17 above referred to. The District Court construed section 4 of the new regulations to be a savings clause purposely inserted therein by the Secretary to preserve only the right of the United States to punish for offenses committed under the old act or regulations.

The District Court held that a demand letter issued under the 1945 regulations expired with the regulations. The Circuit Court held that the demand letter under the old 1945 regulations was still in existence and that paragraph four of the regulations of 1951 applied to acts done by the Commissioner, taking the wording entirely out of its context and construing it in favor of the United States.

Conflict in the Circuits:

A conflict exists between the holdings of the 7th Circuit and the instant case. This case conflicts with the holdings of the 7th Circuit in the case of *United States* vs. *Mustari,* 109 F. 2nd 438. The 7th Circuit holds in the Mustari case that the demand letter is an indispensable condition precedent to a criminal prosecution. The Fourth Circuit's holding in this case is in effect that the demand letter is not important and that an old letter issued in 1947 under the 1945 Regulation, which Regulation was superseded by the regulation of April 1, 1951, was revived and brought forward into the new regulation without a word being said by the Secretary of the Treasury, or the Com-

missioner, incorporating the demand letter issued under the old regulation into the new.

It will be noted that paragraph four of the new regulation is devoted entirely to preserving the power in the United States to prosecute for offenses committed under the old regulation, while nothing whatever is said in the new regulation about preserving the demand letter issued under the old. The United States concedes that no demand letter was issued under the regulation in force at the time the alleged offenses were committed and charged in the indictment.

The MUSTARI case cited above holds that the statute is not self executing, and we quote:

> "The statute is not self-executing in respect to the imposition of penalties for the violation of the act by failure to make required returns. It is only when the Commissioner has adopted regulations in conformity with the act and has issued notice to dealers to furnish returns that the dealers have any duty under the act to make returns. Since the penalties imposed are criminal penalties, and since there is no language which expressly requires dealers to make returns for dispositions which are made prior to the demand for returns, the language should not be given a retrospective effect to include such past dispositions. If the act had imposed the duty to make returns without conditioning that duty upon a formal regulation and requirement by the Commissioner, we think it is clear that language identical with the language in question would be construed to require reports only of such dispositions as should be made after the act became effective. Since under the provisions of the section the act does not become effective as against dealers until the Commissioner has indicated that they are required to make a return, we think the proper construction of the language must be that the dealers shall render returns on all dispositions made after demand by the Commissioner."

The Commissioner nor the Secretary inserted in the new regulation a single word about preserving the demand letter in the new regulation which was provided for in the old, but they did insert and provide for punishment for offenses which were committed under the old after the new regulation went into effect.

It is apparent by the absence of any wording in the new regulation about preserving the demand letter issued under the old in the new that it was not the intent of the Secretary nor the Commissioner to so preserve the demand letter in the new regulation, but that a new demand letter should be issued and served on the dealer under the new regulation before he is required to make any report of sales of sugar.

The Commissioner did not insert in the new regulation any wording preserving the old demand letter, and the Circuit Court ought not to insert it now for the Commissioner. Citizens should not be made criminals unless there is a specific statute or regulation making the violation criminal and laying down what shall constitute the offense in plain and decisive language.

The 4th Circuit in the instant case undertakes to construe section 4 of the regulation as having some relation to the demand letter, notwithstanding section 4 is a mere repetition of the conventional form preserving the right of the United States to sue or prosecute under an old statute or regulation that has been repealed or superseded. The mold by which it is determined whether a crime is committed is laid down in the regulations effective April 1, 1951. It prescribes what is to be done to make an offense under it (That is demand in writing). The offenses charged in the indictment all occurred after the effective date of the new regulation. It was clearly the intent of the Commissioner that there should be no crime committed under the

new regulation until a demand letter had been served on the defendants to report. Congress gave the Commissioner the power to make the regulation with the approval of the Secretary of the Treasury. It did not give the Circuit Court the power to make the regulation.

The Circuit Court in this case treated the demand letter as a mere fiction being carried forward without any specific wording to that effect and under the holding of the Circuit Court in this case the demand letter could never cease to have effect until withdrawn by the Commissioner, although the regulation under which it was issued was nonexistent on and after April 1, 1951. While the 7th Circuit held that the demand letter was one of the essential elements to constitute the offense.

None of the other cases cited by the Circuit Court in the Opinion touched on the points raised by the appeal in this case.

It will be noted that Title 18 USCA 3731 gives the United States the right to appeal to the Supreme Court from an adverse ruling in such cases as this and the Supreme Court can then remand the case to the Circuit Court of Appeals, or the Circuit Court of Appeals may certify the same to the Supreme Court. It seems to follow that the petitioners would have the right to have the same reviewed by the Supreme Court if an adverse ruling is had against them in the Circuit Court of Appeals, so that it may be determined by the highest court of the land whether or not they should answer to the indictment.

This case involves the construction of Regulations and whether Regulations 17 of April 1, 1951, repealed Regulations 17 of 1945, and the construction of the wording of the Regulations of April, 1951. Also the relation of regulations to the statutes under which they are promulgated. Therefore, since regulations have become so familiar to our law and affect such a large number of people and the ques-

tions raised are of such importance to the public, this Court should review the decision of the Circuit Court in reversing the District Court.

The petitioners respectfully contend that because of the large number of regulations promulgated by the Secretary of the Treasury affecting the lives of so many citizens of the United States that this Court should grant the petition for a writ of certiorari and review the opinion in this case.

Respectfully submitted, this 27th day of January, 1954.

RAYMOND KYLE HAYES,
Counsel for Petitioners.

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

26 USC 2811

UNITED STATES OF AMERICA

v.

ISAAC M. ELLER, JACK V. ELLER

INDICTMENT—Filed April 20th, 1953

The grand jury charges:

1. That during the period from September, 1947, through March, 1953, Isaac M. Eller and Jack V. Eller, t/a Eller Brothers Wholesale Grocery, were, at North Wilkesboro, in the Middle District of North Carolina, engaged in the business of selling or otherwise disposing of substances of the character used in the manufacture of distilled spirits, more particularly sugar; that on the 29th day of September, 1947, they were served with notice in writing duly issued under authority of the Internal Revenue Code and regulations thereunder to make correct weekly returns in writing showing disposition of sugar in quantities of 200 pounds or more, and of other substances as set out in said notice;

2. That in September, 1951, the exact dates of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 71,000 pounds of sugar, and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Second Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in October, 1951, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 90,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Third Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in November, 1951, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 90,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Fourth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in December, 1951, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 118,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Fifth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in January, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 89,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Sixth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in February, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 63,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Seventh Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in March, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 67,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of two hundred pounds or more as they were required to do.

Eighth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in April, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 24,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of two hundred pounds or more as they were required to do.

Ninth Count

1. The grand jury realleges all the allegations of the first count in this indctment except those contained in the last paragraph thereof, and further charges:

2. That in May, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 80,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Tenth Count

1. The grand jury realleges all the allegations of the count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in June, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 82,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Eleventh Count

1. The grand jury reaalleges all the allegations of the first count in this indctment except those contained in the last paragraph thereof, and further charges:

2. That in July, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 175,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Twelfth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in August, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 99,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Thirteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in September, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 167,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Fourteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in October, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 203,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Fifteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in November, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 111,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Sixteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in December, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 229,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Seventeenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in January, 1953, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 203,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Eighteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in February, 1953, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 152,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Nineteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in March, 1953, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 66,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Twentieth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That between July 2, 1951 and February 10, 1953, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made twenty-seven sales of sugar in quantities of 200 pounds or more in each sale and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of such sales as they were required to do.

A True Bill.

J. T. AUSTIN,
Foreman.

BRYCE R. HOLT,
United States Attorney.

(3038)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	4
Argument	10
Conclusion	13

CITATIONS

Cases:

United States v. *Goldsmith*, 91 F. 2d 983, certiorari denied, 302 U.S. 718 10
United States v. *Mustari*, 109 F. 2d 438 10
United States v. *Signore*, 115 F. 2d 669 10
United States v. *Turner Bros.*, 11 F. Supp. 908 10

Statute:

Internal Revenue Code, 26 U.S.C. 2811 ..... 2, 10, 12
18 U.S.C. 3731 9

Regulations:

Preamble to Regulations 17, 16 F. R. 3111, April 10, 1951, 26 C.F.R. [1952 Supp], part 371 ..... 3, 11
Regulations 17, 26 C.F.R. [1949 ed.] part 371 ..... 6, 10-11
Regulations 17, approved 1945, 10 F. R. 8734, July 14, 1945 6